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Supreme Court of the United States

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No 887

AMERICAN GUILD OF VARIETY ARTISTS, JOEY ADAMS, as its President and JOE SMITH, as its Treasurer,

Petitioners,

—against—

GENE DETROY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner does not append, as required by Rule 23(j), the judgments of the Court of Appeals and the District Court which are sought to be reviewed.

STATUTES INVOLVED

In addition to statutes set forth in the Appendix to the petition at page 34, we note 29 U. S. C., Sec. 411:

> "Sec. 411(b). Any provision of the constitution and by-laws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect."

STATEMENT

The facts are as stated in the opinion of the Court of Appeals, more especially on pages 19-20, 24, 26-28 of the Appendix to the petition.

The plaintiff-respondent notes the following additional facts:

Plaintiff is a member in good standing of the defendant Union (hereinafter called "AGVA") and is not financially obligated to AGVA for any amount whatsoever. Although he was placed on its "Unfair List" because of an alleged indebtedness to a night club owner, plaintiff denies the liability, claims the arbitration was void (R. 88) and asserts that the real reason for the unprecedented action was that he favored a candidate for union office not proposed by the then administration (R. 14). In addition to the blacklisting, Union representatives wrote, telephoned and advised agents and potential employers not to engage plaintiff (R. 16), and misrepresented to employers that plaintiff owed money to the Union (R. 17-18). As a result of such misrepresentation the Union confiscated plaintiff's total salary from one such employer in the sum of $1,000.

This expropriation of property by the Union, without even the color of a court judgment, transcends the power that could be exercised by a sheriff under execution process.

Plaintiff never received any charges, was never given opportunity to make a defense, nor was he ever given any hearing. The Act was meant to cover this very situation.

It may be pointed out that there is no provision in the Union Constitution or by-laws that provides for placing of any one on any "Unfair List". And petitioner points to no such provision. Nor is there any procedure for any one to obtain removal therefrom after being placed on an "Unfair List".

THE WRIT SHOULD NOT BE GRANTED

There is nothing in this case, or in petitioner's argument, to bring it within this Court's established grounds for certiorari.

There is no alleged conflict with any decision of this Court or between the Court below and any other Court of Appeals. The fact that it is claimed certain isolated District Courts held to the contrary is surely not sufficient.

The decision below is not final. Despite the fact that this Court has sometimes varied from its policy, certiorari is not granted where the case is remanded (*American Construction Co.* v. *Jacksonville, T. & K. R. Co.*, 148 U. S. 372, 384).

In the case at bar, the Court of Appeals directed issuance of a temporary injunction. When plaintiff moved to strike defendant's answer, claim was made that there are "further issues of fact." Now that plaintiff is moving for summary judgment in his favor in the District Court, defendant-petitioner claims that "there are issues of fact requiring a trial" (See *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271, 275; *Southern Power Co.* v. *North Carolina Publ. Service Co.*, 263 U. S. 508; *Houston Oil Co.* v. *Goodrich*, 245 U. S. 440).

The type of factual situation in the case at bar is not that which will recur. Plaintiff was placed on the "Unfair List" for failure to pay an arbitration award between plaintiff and a third party. The Union interfered and (without authority in law or in its constitution) imposed "discipline" upon its member by arrogating to itself the powers of a sheriff and confiscated his property. That is the unique set of facts here. Petitioner conceded an unusual situation when its second "Question Presented" uses the words "the state of facts in the instant case."

Experience during the first year of Title I of Landrum-Griffin Act shows that there were all told no more than a score of cases in the courts; and there is every indication that there will be less. Thus, there is no need for this Court to decide any questions that may arise.

THE COURT OF APPEALS WAS CORRECT

The Court of Appeals held that defendant's action "the violation of federal law [was] clear and undisputed" (App. p. 27). Even the District Court, when it dismissed the complaint on a specious technicality conceded "that the Union has violated plaintiff's rights in disciplining him without a hearing" (App. p. 33). Surely, if two courts have held defendant's acts illegal, no higher equity court should be zealous to overturn a proper judgment so that the Union may resume an illegal course of conduct. We must never lose sight of the fact that Title I of the Landrum-Griffin Act is entitled "Bill of Rights of Members of Labor Organizations."

The opinion of Chief Judge Lumbard (App. pp. 18-28), thoroughly analyzes the issues of law and fact in this case. We submit the Court of Appeals was eminently correct.

Going further, there is additional support for the result below.

Even before the Act, the Courts have uniformly enjoined the device where a union uses an "unfair list" to compel its members or a third party to submit to its decrees without the interposition of ordinary court process (*Loewe v. Lawlor*, 208 U. S. 274; *American Federation of Musicians v. Stein*, 213 F. 2d 679, 683 (C. A. 6th); *Franklin v. Associated Musicians of Greater New York, etc.*, 204 Misc. 521 N. Y.).

Article XX, on which petitioner relies, expressly forbids any member to bring a court proceeding at any time. No

only would this be illegal under Sections 411 (a) (4) and 411 (b), but also under cases such as *Carbon Black Export, Inc. v. S.S. Monrosa*, 254 F. 2d 297, 300 (C. A., 5th), holding invalid and against public policy any attempt to oust courts of jurisdiction in advance of a controversy.

Section 101 (a) (4) of the Act (29 U. S. C. 411 (a) (4)) presumes a reasonable hearing procedure that would be preliminary to any disciplinary action against a member. In the case at bar, the member was disciplined ex parte, and nothing is provided whereby he can get off the list.

It is incumbent, then, upon the defendant for it to rely upon its own constitution and to show not only what its provisions for discipline under Section 101 (a) (5), are but also that they were complied with.

The Act requires that plaintiff be served not only with written charges but given a reasonable time to prepare his defense and given a full and fair hearing. Admittedly, none of these provisos were complied with in this case.

Therefore, the Union's constitution is in conflict with the Statute. Compare Section 102 providing that any provision of the constitution and by-laws inconsistent with the provisions of this Bill of Rights be deemed of "no force and effect".

On page 34 of the Union Constitution, Section 3 of Article XVII, does provide for some sort of a hearing before a member may be disciplined. This was not complied with. Plaintiff's remedy is an appeal under Section 4, same page, to the next convention in June. That would be beyond the four month statutory provision. Is it not more logical for a court to take immediate cognizance of the case, rather than to require this plaintiff to lose earnings for four months before going to court, especially when it is considered that an entertainer's only source of income is his theatrical engagements? A lost week can never be regained.

Article XX, page 37 of the Union constitution, subdivision (B), relied on in the petition here, is entirely irrelevant. Article XVII on page 33, does mention discipline, but its provisions were disregarded by the Union.

Section 101 (a) (4) does not require a plaintiff to wait four months in every case. The key to its real meaning is the use of the phrase "not exceeding four months". It was the intention of Congress to preserve the body of case law on exhaustion of remedies and not to create a new substantive rule on that subject. Some unions may have had a procedure that could be finished in four months or less; others took several years until national and international conventions. These were outlawed by the Act.

See 48 Georgetown Law Journal, p. 254, where the author of an article in a Symposium on the Act, said.

> "The principal question arising, which bears repeating, is whether Congress intended to write a new 'exhaustion of remedies' rule binding on the courts or whether it simply intended to ban the union's authority to *require* complete exhaustion as a prerequisite to court action. In the opinion of the writer, the latter construction of legislative intent is supported not only by the language of the subsection itself but also unequivocally by Senator Kennedy's explanation of the provision to the Senate after adoption of the bill in conference."

Plaintiff urges that the true construction of Section 101 (a) (4) is that, unless the entire process of charges through ultimate appeal can be completed within four months, the procedure is unreasonable on its face, to the extent that plaintiff's right to resort to court relief arises immediately, without any waiting period. Articles XVII and XX of the Union constitution require that appeals must go to the Convention, which is held in June, eleven months after plaintiff was placed on the unfair list. This inter-

pretation is in 48 Georgetown Law Journal 226, at 238 where the same author says:

> "* * * unless they can complete the entire process of charges, trials and appeals within a period of six (now four months, their [the Union's] right to decide is forfeited in favor of court adjudication."

CONCLUSION

THE PETITION FOR CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

HENRY M. KATZ,
Attorney for Respondent.

ABBIE GOLDSTEIN,
Of Counsel.